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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

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# No. 848

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CONTINENTAL CASUALTY COMPANY,
*Petitioner,*

*vs.*

GILLER CONCRETE COMPANY, INC., and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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T. J. Blackwell,
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*vs.*

GILLER CONCRETE COMPANY, INC., and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY.

---

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.**

To The Honorable Charles Evans Hughes, Chief Justice of The United States Supreme Court and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

**Summary Statement of the Matter Involved.**

This is a declaratory judgment suit under the Federal Declaratory Judgment Act, brought in the District Court of the United States for the Southern District of Florida, by Giller Concrete Company, Inc., respondent, against Continental Casualty Company, petitioner herein.

It was contended that a policy of automobile liability insurance (R. 11) issued by petitioner to that respondent on the 6th day of December, 1938, was still in effect on the 3rd day of April, 1939, when Frederick S. Colburn and Myra Plumb Colburn were injured in a collision between one of the motor trucks described in said policy and a Buick automobile in which the Colburns were riding (R. 1, 10). A declaratory judgment to the effect that the petitioner was obligated to defend the Colburn claims was sought.

The Colburns had filed separate personal injury actions against Giller Concrete Company, Inc., (R. 41), claiming large damages, and it was asserted by the defendant in those actions, respondent here, that petitioner was obligated to assume the defense of those actions, on the respondent's behalf, and to pay any judgment that might be rendered therein within the limits of the policy.

Petitioner declined to assume the defense of the stated damage actions, taking the position that the automobile liability insurance policy above mentioned was cancelled by mutual consent of the parties thereto on the 29th day of March, 1939, at which time substitute liability insurance coverage on the motor vehicles of Giller Concrete Company, Inc., including the motor truck in question, was provided by American Mutual Liability Insurance Company, respondent.

At all times after the 6th day of December, 1938, Giller Concrete Company, Inc., had declined to pay unto the petitioner the premium on its policy of automobile liability insurance. Petitioner endeavored to collect the money so due it during the months of January, February and March, and did not immediately serve the customary five day notice to cancel the policy for such non-payment. Finally, being unwilling to further provide gratuitous insurance protection, it prepared to effect cancellation (R. 49, 50).

On the 23rd day of March, 1939, or thereabouts, Charles

Giller, as head of Giller Concrete Company, Inc., was interviewed by petitioner's agent, George O. Wright. Giller agreed to obtain substitute automobile liability insurance coverage for his said company, without formal notice of cancellation, upon the understanding that petitioner's policy would be allowed to continue in force for a short period, until substitute insurance could be arranged for (R. 50).

Charles Giller then notified his manager, Jack Bernard, to place the said automobile liability insurance with American Mutual Liability Insurance Company, respondent, and on the 28th day of March, 1939, Bernard wrote to the Jacksonville, Florida, office of the insurance company last named, ordering the insurance. On the following day that company placed the risk on binder, after its Jacksonville manager, one Hibler, had communicated with Bernard by long distance telephone, and was purported to have been told by Bernard that the prior policy had been cancelled (R. 51).

In connection with the foregoing, the record discloses (R. 51) that:

> "* * * it is undisputed that under date of March 28, 1938, Giller Concrete Company, Inc., through its duly authorized representative at Ft. Lauderdale, wrote a letter to American Mutual Liability Insurance Company, at Jacksonville, requesting that the latter company issue a policy in the name of Giller Concrete Company, Inc., on two International trucks, to cover public liability and property damage.
>
> "It is also undisputed that under date of March 29, 1939, American Mutual Liability Insurance Company, through its duly authorized representative, wrote a letter to Giller Concrete Co., Inc., in response to the latter's request for automobile insurance on its two International trucks, in which the following language was used:
>
> " 'Following receipt of completed and signed application at this office, policies will be promptly issued

> from our district office in Atlanta, Ga., and forwarded to you, *but pending receipt of same, you may accept this letter as full evidence of your insurance coverage with us.*' "

After the happening of the Colburn accident, on the 3rd day of April, 1939, American Mutual Liability Insurance Company, respondent, repudiated its binder agreement.

Giller Concrete Company, Inc., then called upon petitioner to defend the damage actions brought by Frederick S. Colburn and Myra Plumb Colburn. The petitioner declined to do so after learning of the binder agreement entered into on the 29th day of March, 1939, between Giller Concrete Company, Inc., and American Mutual Liability Insurance Company.

Thereupon, Giller Concrete Company, Inc., filed the declaratory judgment suit above referred to (R. 2) in the United States District Court for the Southern District of Florida, naming Continental Casualty Company as sole defendant. However, petitioner then filed a cross-complaint (R. 20) against American Mutual Liability Insurance Company, as third party defendant, relying upon the binder contract of insurance as having effected a termination of the policy issued on the 6th day of December, 1938.

The case was referred to a special master for findings of fact and conclusions of law. The master found (R. 53):

> "That at least ten days prior to April 3, 1939, it was mutually agreed that the automobile policy issued by Continental Casualty Company to Giller Concrete Co., Inc., would ipso facto become cancelled, and of no further force or effect, simultaneously with the procurement of other liability insurance coverage on the two motor trucks.
>
> * * * * * * *
>
> "That, in line with said agreement, such other liability insurance coverage was actually procured from

> American Mutual Liability Insurance Company under date of Mar. 29, 1939, at which time the Continental Casualty Company's policy was automatically cancelled and of no further force and effect."

The District Judge overruled the special master (R. 429), and held that the binder agreement did not become a valid contract of substituted insurance because the insured's agent informed the substitute insurer's manager that the original policy had been cancelled, but did not state further (no inquiry being made), that the cancellation would not be effective until substitute insurance was obtained.

The Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court (R. 467), and held that the binder agreement was voided by reason of the failure of the insured to supply, in a long distance telephone conversation, information that admittedly was not requested.

The Circuit Court of Appeals also held, on a cross-appeal taken by Giller Concrete Company, Inc., against Continental Casualty Company, that petitioner was liable (R. 466) for the said respondent's attorney's fees, incurred in prosecuting the said declaratory judgment suit, by virtue of a statute of the State of Florida, known as Section 6220, Compiled General Laws of 1927 (Section 4263, Revised General Statutes; Ch. 4173, Acts of 1893, as amended by Ch. 7295, Acts of Florida of 1917). This statute was enacted prior to the enactment of the Federal Declaratory Judgment Act of March 3, 1911 (28 U. S. C. A. 400), and prior to the passage of the Florida Declaratory Judgment Act of 1919 (Ch. 7857, Acts of Florida of 1919; Sec. 4953 *et seq.*, Compiled General Laws of Florida of 1927).

In so holding, the Circuit Court of Appeals reversed the ruling of the District Judge on the question as to attorney's fees, applying the attorney's fee statute to a situation not

contemplated by it, and penalizing the petitioner, not as an incident to a wrongful refusal to pay, and not as a corollary to coercive relief, so construing the said statute of the State of Florida in a manner conflicting with the construction thereof by the highest court of that State.

## II.

### Reasons Relied on for the Allowance of the Writ.

1. The Circuit Court of Appeals for the Fifth Circuit has rendered in this case a decision in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *Hanover Fire Insurance Co.* v. *Merchants' Transportation Co.*, 15 F. (2d) 946, Certiorari denied 273 U. S. 764, 47 S. Ct. 472, 71 L. Ed. 877, on a question of general importance, in holding that a contract of insurance did not result between Giller Concrete Company, Inc., and American Mutual Liability Insurance Company because the insured gave no information as to when the cancellation of the prior policy became effective and the reason for such cancellation, when no such information was sought by the insurer.

2. The Circuit Court of Appeals for the Fifth Circuit has rendered in this case a decision on an important question in the law of insurance contracts in a way probably in conflict with applicable local decisions, the insurance contract involved being a local contract entered into in the State of Florida. It is believed by petitioner that, under the law of Florida, the concealment that will void a contract of insurance is the intentional withholding of a material fact by the insured, and not the unintentional withholding of information not sought by the insurer.

3. The ruling of the Circuit Court of Appeals in this case, on the cross-appeal awarding attorney's fees to respondent,

Giller Concrete Company, Inc., for the prosecution of its suit for declaratory relief, is in conflict with the controlling decision of the Supreme Court of Florida in the case of *Pendas* v. *Equitable Life Assurance Society*, 129 Fla. 253, 176 So. 104, for that the highest court of the State of Florida has interpreted the Florida attorney's fee statute, here involved, as being applicable only in case of an insurer's wrongful refusal to pay, and not merely as an incident to the entry of judgment. A difference of opinion, where no duty to pay exists, calling for a declaration of rights, but affording no ground for coercive relief, is not wrongful conduct, within the Florida rule, which is here controlling, and affording a ground for the enforcement of a penalty.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket No. 9571, *Continental Casualty Company, Appellant,* v. *Giller Concrete Company, Inc., et al., Appellees,* to the end that the said cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by the court, and for such further relief as to this Court may seem proper.

Dated this 8th day of March, 1941.

T. J. BLACKWELL,
*Counsel for Petitioner.*